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Office of Administrative Law Judges
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Issue Date: 25 January 2005

Case No. 2002-BLA-5459

In the Matter of:
RODNEY D. ISOM,
Claimant,

v.

PECKS BRANCH MINING CO., INC.,
Employer,
and
LIBERTY MUTUAL INSURANCE,

and

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS,
Party-in-Interest.

BEFORE: THOMAS F. PHALEN, JR.
Administrative Law Judge

APPEARANCES:
Susie Davis, Lay Representative
On behalf of Claimant

Francesca L. Maggard, Esq.
On behalf of Employer

DECISION AND ORDER – DENIAL OF BENEFITS

This is a decision and order arising out of a claim for benefits under Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended by the Black Lung Benefits Act of 1977, 30 U.S.C. §§ 901-962, ("the Act") and the regulations thereunder, located in Title 20 of the Code of Federal Regulations. Regulation section numbers mentioned in this Decision and Order refer to sections of that Title.[1]

[1] The Department of Labor amended the regulations implementing the Federal Coal Mine Health and Safety Act of 1969, as amended. These regulations became effective on January 19, 2001, and are found at 65 Fed. Reg. 80, 045-80,107 (2000)(to be codified at 20 C.F.R. Parts 718, 722, 725 and 726). On August 9, 2001, the United States District Court for the District of Columbia issued a Memorandum and Order upholding the validity of the new regulations. All citations to the regulations, unless otherwise noted, refer to the amended regulations.

On September 4, 2002, this case was referred to the Office of Administrative Law Judges by the Director, Office of Workers' Compensation Programs, for a hearing. (DX 27).[2] A formal hearing on this matter was conducted on February 18, 2004, in Pikeville, Kentucky by the undersigned Administrative Law Judge. All parties were afforded the opportunity to call and to examine and cross examine witnesses, and to present evidence, as provided in the Act and the above referenced regulations.

ISSUES[3]

The issues in this case are:

1. Whether the Miner has pneumoconiosis as defined by the Act;

2. Whether the Miner's pneumoconiosis arose out of coal mine employment;

3. Whether the Miner is totally disabled;

4. Whether the Miner's disability is due to pneumoconiosis;[4] and

5. Whether the Claimant has established a material change in conditions.

(DX 27).

Based upon a thorough analysis of the entire record in this case, with due consideration accorded to the arguments of the parties, applicable statutory provisions, regulations, and relevant case law, I hereby make the following:

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Background

Rodney Isom ("Claimant") was born on September 2, 1953; he was 50 years-old at the time of the hearing. (DX 3). He completed the 12th grade. (DX 3; Tr. 16). On July 24, 1972, he married Wanda Wilford. (DX 3; Tr. 15-16). Claimant has no dependent children under the age of 18. (DX 3; Tr. 23). I find that Claimant has one dependent for purposes of augmentation.

On his application for benefits, Claimant stated that he engaged in coal mine employment for 17 years. (DX 3). Claimant's last coal mine employment was working as a roof bolter. (DX 5; Tr. 17). Claimant describes the physical requirements of the work to include standing for 7.5 hours per day and lifting and carrying 5-10 pounds several times per day. (DX 5). Also, his coal

[2] In this Decision, "DX" refers to the Director's Exhibits, "EX" refers to the Employer's Exhibits, "CX" refers to the Claimant's Exhibits, and "Tr." refers to the official transcript of this proceeding.

[3] Whether the miner worked at least 15 years 9 months in or around one or more coal mines; and whether the named employer is the Responsible Operator, were withdrawn at the hearing. (Tr. 13-14). Also, Employer listed other issues that will not be decided by the undersigned; however, they are preserved for appeal. (Item 18 DX 27).

[4] This issue was not marked on DX 27, but was added at the hearing. (Tr. 13).

mine employment was all underground. (DX 5; Tr. 17). Claimant last worked in and around coal mines in 1993, but he quit due to health problems. (DX 3; Tr. 17-18). He receives disabled Social Security, and received $17,500 in state Black Lung benefits. (DX 3; Tr. 23).

Procedural History

Claimant filed his first claim for benefits under the Act on September 13, 1995. (DX 1). The Director issued a Proposed Decision and Order Memorandum of Conference – Denial of Benefits on October 1, 1997. (DX 1). Claimant requested reconsideration of his claim, and on December 12, 1997, the Director affirmed its prior decision by again denying benefits. Claimant responded by requesting modification, which was denied by the Director on May 29, 1998. Claimant did not appeal.

Claimant filed his instant claim for benefits on September 17, 2001. (DX 3). On June 5, 2002, the Director issued a Proposed Decision and Order – Denial of Benefits. (DX 24). On June 25, 2002, Claimant requested a formal hearing. (DX 24). The hearing was held before the undersigned on February 18, 2004, at which time 60 additional days were allotted for the submission of outstanding evidence, and an additional 30 days for the submission of briefs, which were to be postmarked by May 19, 2004. (Tr. 23).

At the hearing, the undersigned told the parties to get together concerning any problems with submission dates, and to let me know if they need any extensions, rather than just filing a motion. (Tr. 24). On July 19, 2004, two months after the brief deadline, Employer submitted a Motion for Leave to File Late Brief, in which it explained that due to a calendar error and heavy workload Employer had failed to complete its brief and had enclosed it for consideration. Due to the failure to request an extension prior to the expiration of the brief deadline, Employer's motion is denied.

Length of Coal Mine Employment

The parties have stipulated that the Claimant worked at least 15 years and 9 months in or around one or more coal mines. (DX 32). I find that the record supports this stipulation, (DX 5-11), and therefore, I hold that the Claimant worked at least 15 years and 9 months in or around one or more coal mines.

Claimant's last employment was in the Commonwealth of Kentucky; (DX 5), therefore, the law of the Sixth Circuit is controlling. [5]

Responsible Operator

Liability under the Act is assessed against the most recent operator which meets the requirements of §§ 725.494 and 725.495**.** The District Director identified Pecks Branch Mining Co., Inc. as the putative responsible operator. (DX 17, 24). Pecks Branch Mining Co., Inc. does

[5] Appellate jurisdiction with a federal circuit court of appeals lies in the circuit where the miner last engaged in coal mine employment, regardless of the location of the responsible operator. *Shupe v. Director, OWCP*, 12 B.L.R. 1-200 (1989)(en banc).

not contest this issue. (Tr. 14). After review of the record, I find that Pecks Branch Mining Co., Inc. is properly designated as the responsible operator in this case.

MEDICAL EVIDENCE

Section 718.101(b) requires any clinical test or examination to be in substantial compliance with the applicable standard in order to constitute evidence of the fact for which it is proffered. *See* §§ 718.102 - 718.107. The claimant and responsible operator are entitled to submit, in support of their affirmative cases, no more than two chest x-ray interpretations, the results of no more than two pulmonary function tests, the results of no more than two blood gas studies, no more than one report of each biopsy, and no more than two medical reports. §§ 725.414(a)(2)(i) and (3)(i). Any chest x-ray interpretations, pulmonary function studies, blood gas studies, biopsy report, and physician's opinions that appear in a medical report must each be admissible under § 725.414(a)(2)(i) and (3)(i) or § 725.414(a)(4). §§ 725.414(a)(2)(i) and (3)(i). Each party shall also be entitled to submit, in rebuttal of the case presented by the opposing party, no more than one physician's interpretation of each chest x-ray, pulmonary function test, arterial blood gas study, or biopsy submitted, as appropriate, under paragraphs (a)(2)(i), (a)(3)(i), or (a)(3)(iii). §§ 725.414(a)(2)(ii), (a)(3)(ii), and (a)(3)(iii). Notwithstanding the limitations of §§ 725.414(a)(2) or (a)(3), any record of a miner's hospitalization for a respiratory or pulmonary or related disease, or medical treatment for a respiratory or pulmonary or related disease, may be received into evidence. § 725.414(a)(4). The results of the complete pulmonary examination shall not be counted as evidence submitted by the miner under § 725.414. § 725.406(b).

Claimant selected Dr. Glen Baker to provide his Department of Labor sponsored complete pulmonary examination. (DX 12, 13). Dr. Baker conducted the examination on November 9, 2001. I admit Dr. Baker's report under § 725.406(b). I also admit Dr. Sargent's quality-only interpretation of the chest x-ray under § 725.406(c). (DX 13).

Claimant completed a Black Lung Benefits Act Evidence Summary Form. (CX 2). Claimant designated Dr. Bryan Flint's record as "Other medical evidence." At the hearing, Claimant testified that Dr. Flint had been his treating physician for the respiratory condition. (Tr. 20). Therefore, this report is more accurately categorized as a "Hospitalization record and treatment note." As such, Claimant's evidence complies with the requisite quality standards of §§ 718.102-107 and the limitations of § 725-414 (a)(3). Therefore, I admit the evidence Claimant designated in its summary form.

Employer completed a Black Lung Benefits Act Evidence Summary Form. (EX 3A).[6] Employer designated Dr. Dahhan's complete pulmonary examination conducted on January 16, 2002. Employer also included Dr. Wheeler's reading of the January 16, 2002 x-ray as initial evidence, and his reading of the November 9, 2001 x-ray as rebuttal evidence. Finally, Employer included Dr. Fino's medical evidence review dated November 11, 2002, and Dr.

[6] At the hearing, the undersigned marked Employer's form EX 3. (Tr. 12). The undersigned also allotted 60 days for the submission of additional evidence. (Tr. 10, 23). When Employer submitted the supplement to Dr. Fino's report, however, it requested that the addition be marked EX 3. Also included in this submission was an amended summary form. Therefore, I will mark the amended Black Lung Benefits Act Evidence Summary Form as EX 3A, and the supplement to Dr. Fino's report will be marked EX 1A, and will receive both exhibits into evidence.

Fino's report supplement dated March 11, 2004 as medical reports. With exception of Dr. Fino's November 11, 2002 medical report,[7] I find that Employer's evidence complies with the requisite quality standards of §§ 718.102-107 and the limitations of § 725.414(a)(3). Therefore, I admit Drs. Dahhan and Wheeler's reports, and Dr. Fino's March 11, 2004 reports into evidence.

X-RAYS

Exhibit	Date of X-ray	Date of Reading	Physician / Credentials	Interpretation
DX 13	11/9/01	11/09/01	Baker[8]	1/0 pp
DX 13	11/9/01	11/20/01	Sargent, BCR[9], B-reader[10]	Quality only
EX 2	11/9/01	11/20/02	Wheeler, BCR, B-reader	Negative
DX 14	1/16/02	01/16/02	Dahhan, B-reader	Negative
DX 15	1/16/02	03/04/02	Wheeler, BCR, B-reader	Negative

PULMONARY FUNCTION TESTS

Exhibit/ Date	Co-op./ Undst./ Tracings	Age/ Height[11]	FEV_1	FVC	MVV	FEV_1/ FVC	Qualifying Results
DX 13 11/9/01	Fair/ Good/ Yes	48 67"	2.80	3.61	73	77	No

[7] Dr. Fino's November 11, 2002 report is an extensive medical review of all evidence from both the instant and prior claims. Included in this review are Chest x-ray readings from films dated January 7, 1994, March 9, 1994, June 23, 1994, and June 21, 1996; PFT values from a study dated September 9, 1997; complete pulmonary examinations and reports dated October 12, 1995, April 3, 1996, November 9, 2001, January 16, 2002; and medical letters dated November 19, 1997 and May 12, 2002. From this list, only the November 9, 2001 and January 16, 2002 complete pulmonary examinations were admitted into evidence in this claim. Also, since Dr. Fino's conclusions are not specific, but reference all of the evidence reviewed, it is not possible for the undersigned to distinguish which evidence he used to make his specific findings. Therefore, since this report is based on non-admissible evidence, and due to the limitations of § 725.414(a)(3), the November 11, 2002 report is not admissible.

[8] At the time the x-ray reading, Dr. Baker did not hold B-reader x-ray interpretation credentials. But the June 7, 2004 "B-reader" list states that he was a B-reader from February 1, 1993 to January 31, 2001, and again from June 1, 2002 to present. Also, he is listed as an A-reader from February 1, 2001 to May 31, 2002.

[9] A physician who has been certified in radiology or diagnostic roentgenology by the American Board of Radiology, Inc., or the American Osteopathic Association. *See* 20 C.F.R. § 727.206(b)(2)(III). The qualifications of physicians are a matter of public record at the National Institute of Occupational Safety and Health reviewing facility at Morgantown, West Virginia.

[10] A "B" reader is a physician who has demonstrated proficiency in assessing and classifying x-ray evidence of pneumoconiosis by successful completion of an examination conducted by or on behalf of the Department of Health and Human Services. This is a matter of public record at HHS National Institute for Occupational Safety and Health reviewing facility at Morgantown, West Virginia. (42 C.F.R. § 37.5l) Consequently, greater weight is given to a diagnosis by a "B" Reader. *See Blackburn v. Director, OWCP*, 2 B.L.R. 1-153 (1979).

[11] I must resolve the height discrepancy recorded on the pulmonary function tests. *Protopappas v. Director, OWCP*, 6 B.L.R. 1-221 (1983). Therefore, I find that the miner's actual height is 67 inches.

DX 14 1/16/02	Good/ Good/ Yes	48 66.5"	3.09	3.65	67	85	No

* post-bronchodilator values

ARTERIAL BLOOD GAS STUDIES

Exhibit	**Date**	**pCO_2**	**pO_2**	**Qualifying**
DX 13	11/9/01	38	82	No
DX 14	1/16/02	33	81.6	No

*post-exercise values

Narrative Reports

Dr. Glen R. Baker Jr., an internist and pulmonologist, examined the Claimant on November 9, 2001. (DX 13). Based on symptomatology (daily sputum, wheezing, dyspnea, cough, orthopnea, ankle edema, and shortness of breath), employment history (15 years underground coal mine employment, most recently as a roof bolter, quitting in 1993), individual history (childhood pneumonia, attacks of wheezing, chronic bronchitis, arthritis, diabetes mellitus, and high blood pressure), family history (heart disease, diabetes, and cancer), physical examination (normal), smoking history (10 years at one pack per day, quitting in 1980), chest x-ray (1/0), PFT (normal), ABG (normal), and an EKG (normal), Dr. Baker diagnosed coal worker's pneumoconiosis based on the x-ray and coal dust exposure, and chronic bronchitis based on history of symptoms. He also stated that Claimant's CWP was caused by a combination of coal dust exposure and cigarette smoking. Dr. Baker noted that Claimant's impairment was minimal, but in a subsequent entry he also marked a "No Impairment" box to identify miner's level of pulmonary impairment. With Dr. Baker concluded that Claimant was disabled due to DJD/Disc C-spine and L-S Spine, he also stated that Claimant has the respiratory capacity to perform the work of a coal miner or to perform comparable work in a dust-free environment.

Dr. Abdul Dahhan, an internist and pulmonologist, examined the Claimant on January 16, 2002, and submitted his narrative report on January 21, 2002. (DX 14). He reviewed symptomatology (cough, sputum, wheezing, and dyspnea on exertion), employment history (17 years as an underground coal miner, working as a pinner operator and general laborer, ending in 1993), individual history, smoking history (20 years at one pack per day, but quit 25 years ago), physical examination (no relevant findings), chest x-ray (negative), PFT (normal, but the MVV was invalid due to poor effort), ABG (normal), and an EKG (regular sinus rhythm with normal tracings). Dr. Dahhan found no evidence of pneumoconiosis or pulmonary disability secondary to coal dust exposure. Also, he stated that there were no objective findings to indicate any pulmonary impairment or disability. He opined that from a respiratory standpoint, Claimant retains the physiological capacity to continue his previous coal mining work or a job of comparable physical demand. Also, while Claimant has significant orthopedic problems, he concluded that they are not caused by inhalation of coal dust or CWP.

Dr. Fino, an internist, pulmonologist, and B-reader, reviewed Dr. Flint's report and submitted a response letter dated March 11, 2004. (EX 1, 1A). Dr. Fino stated that the January 12, 2004 testing revealed some evidence of nocturnal or nighttime oxygen de-saturation, but that these findings do not represent any evidence of parenchymal lung disease. Also, he stated that there are many non-occupationally related sleep disorders, such as sleep apnea, which can result in a drop in the oxygen saturation during sleep.[12]

Hospitalization Records and Treatment Notes

Claimant submitted hospital treatment records from his treating physician, Dr. Bryan Flint Jr., dated December 22, 2003. (CX 1). This report included the data generated from Claimant's Oximetry testing conducted on January 12 and 13, as well as Dr. Flint's Patient Assessment and Care Plan dated January 14, 2004. The report notes that Claimant's breathing was slightly labored, but that breath sounds were clear bilaterally. Also, he notes that shortness of breath limits Claimant's physical activity level. The report appears to diagnose Claimant with COPD, but merely states that Claimant should successfully manage his COPD. The report makes no mention of smoking history, coal mine employment, or pneumoconiosis, nor does it include any x-ray, PFT, ABG study, CT scan, or narrative medical results.

Smoking History

In response to Employer's interrogatories, Claimant stated that he smoked 10 years at a rate of one pack per day, but quit 25 years ago. (DX 22). At the hearing Claimant testified that he had smoked one pack per day for approximately 12 years, but has not smoked for 30 years. (Tr. 21-22). Dr. Baker reported that Claimant smoked for 10 years at one pack per day, but he quit in 1980. (DX 13). Dr. Dahhan reported that Claimant smoked for 20 years at a rate of one pack per day, but quit 25 years ago. (DX 14). With exception of Dr. Dahhan's report, which would credit Claimant with having started smoking at three years of age, the record generally supports Claimant's testimony. Therefore, I find that Claimant has a 12 pack-year history, but he quit smoking approximately 30 years ago.

DISCUSSION AND APPLICABLE LAW

Mr. Isom's claim was made after March 31, 1980, the effective date of Part 718, and must therefore be adjudicated under those regulations. To establish entitlement to benefits under Part 718, Claimant must establish, by a preponderance of the evidence, that he:

1. Is a miner as defined in this section; and

2. Has met the requirements for entitlement to benefits by establishing that he:

   (i) Has pneumoconiosis (see § 718.202), and

[12] Dr. Fino concluded that this report has not changed his mind concerning diagnosis as was reported in his November 11, 2002 report. The earlier report has been excluded from evidence due to its reliance on inadmissible evidence. Therefore, those conclusions are also inadmissible as part of this report.

(ii) The pneumoconiosis arose out of coal mine employment (see § 718.203), and

(iii) Is totally disabled (see § 718.204(c)), and

(iv) The pneumoconiosis contributes to the total disability (see § 718.204(c)); and

3. Has filed a claim for benefits in accordance with the provisions of this part.

Section 725.202(d)(1-3); *see also* §§ 718.202, 718.203, and 718.204(c).

Subsequent Claim

The provisions of § 725.309 apply to new claims that are filed more than one year after a prior denial. Section 725.309 is intended to provide claimants relief from the ordinary principles of *res judicata*, based on the premise that pneumoconiosis is a progressive and irreversible disease. *See Lukman v. Director, OWCP*, 896 F.2d 1248 (10th Cir. 1990); *Orange v. Island Creek Coal Company*, 786 F.2d 724, 727 (6th Cir. 1986); § 718.201(c) (Dec. 20, 2000). The amended version of § 725.309 dispensed with the material change in conditions language and implemented a new threshold standard for the claimant to meet before the record may be reviewed *de novo*. Section 725.309(d) provides that:

> If a claimant files a claim under this part more than one year after the effective date of a final order denying a claim previously filed by the claimant under this part, the later claim shall be considered a subsequent claim for benefits. A subsequent claim shall be processed and adjudicated in accordance with the provisions of subparts E and F of this part, except that the claim shall be denied unless the claimant demonstrates that one of the applicable conditions of entitlement (see § 725.202(d) miner. . .) has changed since the date upon which the order denying the prior claim became final. The applicability of this paragraph may be waived by the operator or fund, as appropriate. The following additional rules shall apply to the adjudication of a subsequent claim:
>
> (1) Any evidence submitted in conjunction with any prior claim shall be made a part of the record in the subsequent claim, provided that it was not excluded in the adjudication of the prior claim.
>
> (2) For purposes of this section, the applicable conditions of entitlement shall be limited to those conditions upon which the prior denial was based. For example, if the claim was denied solely on the basis that the individual was not a miner, the subsequent claim must be denied unless the individual worked as a miner following the prior denial. Similarly, if the claim was denied because the miner did not meet one or more of the eligibility criteria contained in part 718 of the subchapter, the subsequent claim must be denied unless the miner meets at least one of the criteria that he or she did not meet previously.

(3) If the applicable condition(s) of entitlement relate to the miner's physical condition, the subsequent claim may be approved only if new evidence establishes at least one applicable condition of entitlement. . . .

(4) If the claimant demonstrates a change in one of the applicable conditions of entitlement, no findings made in connection with the prior claim, except those based on a party's failure to contest an issue, shall be binding on any party in the adjudication of the subsequent claim. However, any stipulation made by any party in connection with the prior claim shall be binding on that party in the adjudication of the subsequent claim.

Section 725.309(d) (April 1, 2002).

Claimant's prior claim was denied by the Department of Labor on the grounds that he failed to establish any of the elements of entitlement. (DX 1). Consequently, Claimant must establish, by a preponderance of the newly submitted evidence, the presence of pneumoconiosis, that pneumoconiosis was caused by coal mine employment, or the existence of a totally disabling respiratory impairment caused by pneumoconiosis. If Claimant is able to prove any of these elements, then he will avoid having his subsequent claim denied on the basis of the prior denial.

Pneumoconiosis

Claimant may establish a material change in conditions by proving the existence of pneumoconiosis under § 718.202. Claimant has the burden of proving the existence of pneumoconiosis, as well as every element of entitlement, by a preponderance of the evidence. *See Director, OWCP v. Greenwich Collieries*, 512 U.S. 267 (1994).

Pneumoconiosis is defined by the regulations:

(a) For the purpose of the Act, "pneumoconiosis" means a chronic dust disease of the lung and its sequelae, including respiratory and pulmonary impairments, arising out of coal mine employment. This definition includes both medical, or "clinical" pneumoconiosis and statutory, or "legal" pneumoconiosis.

(1) *Clinical Pneumoconiosis*. "Clinical pneumoconiosis" consists of those diseases recognized by the medical community as pneumoconiosis, i.e., conditions characterized by permanent deposition of substantial amounts of particulate matter in the lungs and the fibrotic reaction of the lung tissue to that deposition caused by dust exposure in coal mine employment. This definition includes, but is not limited to, coal workers' pneumoconiosis, anthracosilicosis, anthracosis, anthrosilicosis, massive pulmonary fibrosis, silicosis or silicotuberculosis, arising out of coal mine employment.

(2) *Legal Pneumoconiosis*. "Legal pneumoconiosis" includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment. This

definition includes, but is not limited to, any chronic restrictive or obstructive pulmonary disease arising out of coal mine employment.

(b) For the purposes of this section, a disease "arising out of coal mine employment" includes any chronic pulmonary disease or respiratory or pulmonary impairment significantly related to, or substantially aggravated by, dust exposure in coal mine employment.

(c) For purposes of this definition, "pneumoconiosis" is recognized as a latent and progressive disease which may first become detectable only after the cessation of coal mine dust exposure.

Sections 718.201(a-c).

Section 718.202(a) sets forth four methods for determining the existence of pneumoconiosis.

(1) Under § 718.202(a)(1), a finding that pneumoconiosis exists may be based upon x-ray evidence. The record contains four interpretations of two chest x-rays, and one quality-only interpretation. Dr. Baker interpreted the November 9, 2001 film as positive for pneumoconiosis. Dr. Wheeler, a physician dually-certified as a radiologist and B-reader, interpreted the film as negative for pneumoconiosis. I accord greater probative weight to the negative interpretation of Dr. Wheeler in comparison to the contrary interpretation of Dr. Baker based on Dr. Wheeler's superior credentials. Therefore, the November 9, 2001 film is negative for pneumoconiosis.

Dr. Dahhan, a B-reader, interpreted the January 16, 2002 chest x-ray as negative for pneumoconiosis, which was confirmed by Dr. Wheeler. There were no positive readings. Therefore, I find the January 16, 2002 film to be negative for the disease.

I have determined that both of the x-rays in evidence are negative for pneumoconiosis. Also, all of the physicians with superior x-ray reading credentials determined the films to be negative. As a result, I find that the preponderance of the chest x-ray evidence establishes that there is no pneumoconiosis. Therefore, I find that Claimant has failed to establish the presence of pneumoconiosis under subsection (a)(1).

(2) Under § 718.202(a)(2), a determination that pneumoconiosis is present may be based, in the case of a living miner, upon biopsy evidence. The evidentiary record does not contain any biopsy evidence. Therefore, I find that the Claimant has failed to establish the existence of pneumoconiosis through biopsy evidence under subsection (a)(2).

(3) Section 718.202(a)(3) provides that pneumoconiosis may be established if any one of several cited presumptions are found to be applicable. In this case, the presumption of § 718.304 does not apply because there is no evidence in the record of complicated pneumoconiosis. Section 718.305 is not applicable to claims filed after January 1, 1982. Finally, the presumption of § 718.306 is applicable only in a survivor's claim filed prior to June 30, 1982. Therefore, Claimant cannot establish pneumoconiosis under subsection (a)(3).

(4) The fourth and final way in which it is possible to establish the existence of pneumoconiosis under § 718.202 is set forth in subsection (a)(4) which provides in pertinent part:

> A determination of the existence of pneumoconiosis may also be made if a physician, exercising sound medical judgment, notwithstanding a negative x-ray, finds that the miner suffers or suffered from pneumoconiosis as defined in § 718.201. Any such finding shall be based on electrocardiograms, pulmonary function studies, physical performance tests, physical examination, and medical and work histories. Such a finding shall be supported by a reasoned medical opinion.

§ 718.202(a)(4).

This section requires a weighing of all relevant medical evidence to ascertain whether or not the claimant has established the presence of pneumoconiosis by a preponderance of the evidence. Any finding of pneumoconiosis under § 718.202(a)(4) must be based upon objective medical evidence and also be supported by a reasoned medical opinion. A reasoned opinion is one which contains underlying documentation adequate to support the physician's conclusions. *Fields v. Island Creek Coal Co.*, 10 B.L.R. 1-19, 1-22 (1987). Proper documentation exists where the physician sets forth the clinical findings, observations, facts, and other data on which he bases his diagnosis. *Oggero v. Director, OWCP*, 7 B.L.R. 1-860 (1985). A brief and conclusory medical report which lacks supporting evidence may be discredited. *See Lucostic v. United States Steel Corp.*, 8 B.L.R. 1-46 (1985); *see also*, *Mosely v. Peabody Coal Co,.* 769 F.2d 257 (6th Cir. 1985). Further, a medical report may be rejected as unreasonable where the physician fails to explain how his findings support his diagnosis. *See Oggero*, 7 B.L.R. 1-860.

The newly submitted evidentiary record contains two narrative medical opinions by examining physicians. Dr. Baker examined Claimant, and based on an x-ray and exposure he diagnosed pneumoconiosis, and based on history of symptoms, he diagnosed chronic bronchitis. While Dr. Baker set forth clinical observations and findings, I find his reasoning is not supported by adequate data. First, the x-ray reading he relied on was re-read as negative by a more qualified reader. Second, concerning chronic bronchitis, an analysis of history of symptoms is not objective. Finally, the physical examination was normal, and the PFT and ABG study he relied upon were all non-qualifying under Department of Labor standards, leaving as the only objective evidence the x-ray interpretation and the history of coal dust exposure. The Sixth Circuit Court of Appeals has held that merely restating an x-ray is not a reasoned medical judgment under § 718.202(a)(4). *Cornett v. Benham Coal, Inc.*, 227 F.3d 569 (6th Cir. 2000). The Board has also explained that, when a doctor relies solely on a chest x-ray and coal dust exposure history, a doctor's failure to explain how the duration of a miner's coal mine employment supports his diagnosis of the presence or absence of pneumoconiosis renders his opinion "merely a reading of an x-ray . . . and not a reasoned medical opinion." *Taylor v. Brown Bodgett, Inc.*, 8 B.L.R. 1-405 (1985). *See also Worhach v. Director, OWCP*, 17 B.L.R. 1-105, 1-110 (1993)(citing *Anderson v. Valley Camp of Utah, Inc.*, 12 B.L.R. 1-111, 1-113 (1989)(it is permissible to discredit the opinion of a physician which amounts to no more than a restatement of the x-ray reading). Therefore, based on the precedent of *Cornett* and *Taylor*, Dr. Baker's

report, despite his credentials as an internist and pulmonologist, is not a reasoned medical opinion for the purposes of determining the presence of pneumoconiosis under subsection (a)(4).

Dr. Dahhan determined that Claimant does not suffer from pneumoconiosis. He based this conclusion on non-qualifying PFT and ABG values, a normal physical examination, and a negative x-ray. Dr. Dahhan's medical opinion is supported by the objective data he utilized to diagnose whether Claimant suffered from pneumoconiosis. As a result, I find his report is well-documented and well-reasoned. Bolstered by his credentials as internist, pulmonologist, and B-reader, I accord his conclusions substantial probative weight.

Finally, Dr. Fino's report address Dr. Flint's testing, and provides no objective data on which to base a conclusion concerning the existence or absence of pneumoconiosis. Therefore, Dr. Fino's conclusion is not relevant to the analysis under subsection (a)(4).

The record contains one reasoned and documented medical opinion, which concludes that Claimant does not suffer from clinical or legal pneumoconiosis. Furthermore, even without Dr. Dahhan's report, I found that the only medical report finding pneumoconiosis was unreasoned. As a result, I find that the Claimant has failed to establish the presence of pneumoconiosis by a preponderance of the evidence under subsection (a)(4).

Claimant has failed to establish the presence of pneumoconiosis under subsection (a)(1)-(4). Therefore, after weighing all evidence of pneumoconiosis together under §718.202 (a), I find that Claimant has failed to establish the presence of pneumoconiosis.

The newly submitted evidentiary record does not establish the presence of pneumoconiosis. Claimant may still prevent his subsequent claim from being denied on the basis of the prior denial by establishing the existence of a totally disabling respiratory or pulmonary impairment.

Total Disability

Claimant may also establish a material change in conditions by demonstrating that he is totally disabled from performing his usual coal mine work or comparable work due to pneumoconiosis under one of the five standards of § 718.204(b) or the irrebuttable presumption referred to in § 718.204(b). The Board has held that under § 718.204(b), all relevant probative evidence, both like and unlike must be weighed together, regardless of the category or type, in the determination of whether the Claimant is totally disabled. *Shedlock v. Bethlehem Mines Corp.*, 9 B.L.R. 1-195 (1986); *Rafferty v. Jones & Laughlin Steel Corp.*, 9 B.L.R. 1-231 (1987). Claimant must establish this element of entitlement by a preponderance of the evidence. *Gee v. W.G. Moore & Sons*, 9 B.L.R. 1-4 (1986).

I have determined that Claimant has not established that he suffers from complicated pneumoconiosis. Therefore, the irrebuttable presumption of § 718.304 does not apply.

Total disability can be shown under § 718.204(b)(2)(i) if the results of pulmonary function studies are equal to or below the values listed in the regulatory tables found at Appendix

B to Part 718. Considering the newly submitted evidence, neither of the PFTs produced values equal to or below those found in Appendix B of Part 718. Therefore, I find that Claimant has failed to establish total disability under subsection (b)(2)(i).

Total disability can be demonstrated under § 718.204(b)(2)(ii) if the results of arterial blood gas studies meet the requirements listed in the tables found at Appendix C to Part 718. Considering the newly submitted evidence, neither of the ABGs produced values that meet the requirements of the tables found at Appendix C to Part 718. Therefore, I find that Claimant has failed to establish total disability under subsection (b)(2)(ii).

Total disability may also be shown under § 718.204(b)(2)(iii) if the medical evidence indicates that Claimant suffers from cor pulmonale with right-sided congestive heart failure. The record does not contain any evidence indicating that Claimant suffers from cor pulmonale with right-sided congestive heart failure. Therefore, I find that Claimant has failed to establish the existence of total disability under subsection (b)(2)(iii).

Section 718.204(b)(2)(iv) provides for a finding of total disability if a physician, exercising reasoned medical judgment based on medically acceptable clinical or laboratory diagnostic techniques, concludes that a miner's respiratory or pulmonary condition prevented the miner from engaging in his usual coal mine employment or comparable gainful employment. Claimant's usual coal mine employment as a roof bolter included standing for 7.5 hours per day and lifting and carrying 5-10 pounds several times per day. (DX 5).

The exertional requirements of the claimant's usual coal mine employment must be compared with a physician's assessment of the claimant's respiratory impairment. *Cornett v. Benham Coal, Inc.*, 227 F.3d 569 (6th Cir. 2000). Once it is demonstrated that the miner is unable to perform his usual coal mine work, a *prima facie* finding of total disability is made and the party opposing entitlement bears the burden of going forth with evidence to demonstrate that the miner is able to perform "comparable and gainful work" pursuant to § 718.204(b)(1). *Taylor v. Evans & Gambrel Co.*, 12 B.L.R. 1-83 (1988). Nonrespiratory and nonpulmonary impairments have no bearing on establishing total disability due to pneumoconiosis. § 718.204(a); *Jewell Smokeless Coal Corp. v. Street*, 42 F.3d 241 (1994). All evidence relevant to the question of total disability due to pneumoconiosis is to be weighed, with the claimant bearing the burden of establishing by a preponderance of the evidence the existence of this element. *Mazgaj v. Valley Camp Coal Co.*, 9 B.L.R. 1-201 (1986).

There are two narrative medical reports in the record, as summarized above. Neither report concludes that Claimant is totally disabled from a pulmonary standpoint. These physicians are both internists and pulmonologist, and their disability conclusions are supported by the objective evidence in the record. As a result, I find that their opinions concerning total disability are well-reasoned and well-documented.

Taken as a whole, the newly submitted medical narrative evidence does not support a finding of total pulmonary disability. Claimant has not proven by a preponderance of the evidence that he is totally disabled due to pneumoconiosis. Therefore, I find the Claimant has

failed to establish total pulmonary disability or total disability due to pneumoconiosis under § 718.204(b)(iv).

Claimant has failed to establish that he is totally disabled under subsection (b)(i)-(iv). Therefore, after weighing all of the newly submitted medical evidence concerning total disability under §718.204 (b), I find that Claimant has failed to establish that he is totally disabled due to pneumoconiosis.

Entitlement

The Claimant, Mr. Isom, has failed to establish a material change in conditions sufficient to meet the statutory requirements of § 725.309(d) because he has failed to prove he suffers from pneumoconiosis, or that he is totally disabled due pneumoconiosis. Therefore, Mr. Isom is not entitled to benefits under the Act.

Attorney's Fees

An award of attorney's fees is permitted only in cases in which the claimant is found to be entitled to benefits under the Act. Because benefits are not awarded in this case, the Act prohibits the charging of any fee to the Claimant for the representation and services rendered in pursuit of the claim.

ORDER

IT IS ORDERED that the claim of Rodney Isom for benefits under the Act is hereby DENIED.

A

THOMAS F. PHALEN, JR.
Administrative Law Judge

NOTICE OF APPEAL RIGHTS

Pursuant to 20 C.F.R. § 725.481, any party dissatisfied with this Decision and Order may appeal it to the Benefits Review Board within 30 days from the date of this decision, by filing notice of appeal with the Benefits Review Board, P.O. Box 37601, Washington, D.C. 20013-7601. **A copy of a notice of appeal must also be served on Donald S. Shire, Esquire, Associate Solicitor for Black Lung Benefits, Frances Perkins Building, Room N-2117, 200 Constitution Avenue, NW, Washington, D.C. 20210.**